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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

VS.

GABRIEL BRIGUGLIO,
PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether an Attorney's Knowing Status As The Target Of A Federal Grand Jury Investigation In The Same Federal District As The Criminal Trial Is An Actual Conflict Which Must Be Disclosed To The Client And Whether Affirmative Concealment Of The Conflict Is A Per Se Violation Of Petitioner's Fifth Amendment Right To Due Process Because Of Counsel's Status As An Officer Of The Court And Sixth Amendment Rights To Intelligent Selection Of Counsel And Effective Assistance Of Counsel.
2. Whether In Light Of Cuyler v. Sullivan, a Multiple Representation Case, A Criminal Defendant Seeking A New Trial On Appeal Because Of His Trial Counsel's Previously Unobjected To, Concealed Personal Conflict Must Demonstrate That The Conflict Adversely Affected The Representation.
3. Whether A Prosecutor Has A Duty To Disclose To The Court That Trial Counsel Is A Target Of An Investigation By The Prosecutor's Office And Has Testified Before A Grand Jury

And Concomitantly Whether The Trial Court Upon Being Informed Has A Duty To Inquire As To Whether The Conflict And Potential For Intimidation Have Been Disclosed To The Defendant.

4. Whether The Pervasive Reputation Of Anthony Provenzano Which Made It Impossible To Select A Jury In Newark, New Jersey Composed Of Persons Who Were Not Familiar With Him Required That Petitioner, In Order To Ensure Fair Consideration Of The Slight Evidence Against Him, Be Severed Or A Change Of Venue Ordered.

5. Whether A Remand Is Required To Ascertain Whether A Visit By An Unauthorized Party To A Juror In Violation Of A Sequestration Order, Which Resulted In Distribution Of Marijuana To The Juror, Also Resulted In Other Conduct By The Unauthorized Visitor Which Had The Capacity To Influence The Juror's Deliberation Of The Case.

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VS.

GABRIEL BRIGUGLIO,
PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 17, 1980.

Opinion Below

The Judgment Order of the United States Court of Appeals for the Third Circuit is appended to this Petition as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. §1254(1).

Constitutional, Statutory and Rule Provisions Involved

Petitioner seeks review of issues of law arising under the Fifth and Sixth Amendments to the United States Constitution. They are appended to this Petition as Appendix B.

Statement Of The Case

Factual Background

A. The Criminal Conspiracy And Its Alleged Object

Petitioner Gabriel Briguglio was indicted and convicted of alleged involvement in a racketeering conspiracy and racketeering. Trial was conducted in the Federal District Court situated in Newark, New Jersey. Petitioner was jointly tried with Anthony Provenzano, Thomas Andretta and Steven Andretta. Provenzano is an individual of great notoriety on the Eastern seaboard because of continuous and protracted media attention to his alleged strength within the framework of organized crime. According to Ralph Picardo, the government's major witness, Provenzano directed the racketeering enterprise through instructions provided to Salvatore Briguglio. Through the use of Salvatore Briguglio as his supervisor, Provenzano allegedly was able to avoid direct involvement in the activities of the enterprise.

The object of the alleged criminal enterprise was the sale of labor peace. Provenzano, claimed Picardo, was capable of exerting control over the entire network of East Coast Teamster's Unions. On the basis of Provenzano's power and influence, Picardo was capable of offering labor peace to particular business concerns in return for a price. Picardo received his instructions from Salvatore Briguglio and reported directly to him within the chain of command of the enterprise. Salvatore Briguglio was petitioner's brother. At the time of trial, Salvatore Briguglio was deceased. The particular conduct in question at trial was the sale of labor peace to Seatrain Steamship Lines and its subsidiary, Interocean. Labor peace enables a company to avoid the cost of strikes and in many cases to use non-union drivers who will work for lower wages and do not require payments into union welfare and pension funds. Such a transaction was allegedly consummated providing the enterprise with illicit profits.

The alleged participation of petitioner in the enterprise was capsulized at the conclusion

of Picardo's testimony. Picardo testified that petitioner received a small amount of money from his brother (Salvatore Briguglio) for delivery of messages. This alleged messenger function was bolstered by the admission of letters written by Salvatore Briguglio to Picardo. The letters indicated that petitioner transmitted messages to his brother from Picardo. Picardo did not testify as to the contents of any of the messages nor did the government produce any evidence indicating their substance. None of the evidence relating to that function, therefore, indicated that petitioner had knowledge of unlawful acts.[1] Evidence was also adduced that petitioner was present amongst the group on various occasions. In short, the evidence against petitioner was scant and incor-

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1. Consistent with petitioner's having carried messages to and from his brother, there was also testimony indicating that his fingerprints were on two checks issued in 1970. There was no evidence that he knew that the checks were issued for or in connection with an unlawful purpose. In this context, we emphasize that both checks contained notations indicating that they were issued for wholly legal purposes.

porated no clear indication that petitioner was knowledgeable as to the workings or purpose of the enterprise. The most damaging evidence was that of association. Petitioner's brother was a major figure in the enterprise and petitioner was admittedly an acquaintance of other members of it. The association with the others stemmed from petitioner's legitimate employment with organized labor and not from any involvement in crime. At the time of trial, petitioner was vice-president of a Teamster's Local. The Local with which he was involved gave no assistance to the enterprise.

B. The Concealed Conflict Of Trial Counsel - The Facts Pertaining Thereto and Resolution By The Lower Courts.

In February of 1979, petitioner retained counsel, Thomas DiBiasi, to defend him in the trial of the instant offenses. Subsequent to his acceptance of the retainer and several months prior to trial, DiBiasi became aware that he was the target of an ongoing grand jury investigation in the same federal district as that in which petitioner's trial was to occur. DiBiasi was issued a subpoena duces tecum commanding that he ap-

pear to testify on March 20, 1979. He obeyed the subpoena and testified before the grand jury. The tenor of the proceeding made it clear to him that he would be indicted. On May 7, 1979 petitioner's trial commenced. DiBiasi, while acting as petitioner's counsel at no time disclosed to petitioner that he was the target of a grand jury investigation being conducted by the same United States Attorney's office that was prosecuting petitioner's matter. Moreover, petitioner did not learn of the conflict from any other source.

During trial, however, it was nonetheless clear to petitioner and his wife, who was present throughout the trial, that counsel was not exhibiting zeal for petitioner's cause and appeared to be distracted and unable to concentrate. In a conversation with petitioner's wife, counsel made veiled comments pertinent to his personal problems but immediately retracted his statements as being jocular. He thus made affirmative efforts to conceal his conflict when questioned concerning his inattentiveness. Trial concluded on May 30, 1979. On August 14, 1979 defense counsel was formally indicted by the grand jury before which he pre-

viously testified. Petitioner learned of counsel's indictment through newspaper accounts of it. The reasons for counsel's inattentiveness and lack of zeal at trial were now apparent. Subsequently, petitioner also learned that defense counsel was severed from his codefendants for trial purposes. Trial proceeded and the codefendants were convicted. Significantly, petitioner's name was mentioned at the trial. Thereafter, defense counsel entered pleas of guilty and was scheduled to be sentenced in December of 1980. It can fairly be assumed from that defense counsel during petitioner's trial was aware that petitioner was to be mentioned at the trial of the offenses for which counsel was indicted and that his association as counsel to petitioner was potentially prejudicial to him. He nonetheless continued representation of the cause and made no disclosures to petitioner who was wholly unaware of the investigation and counsel's status of it.

Petitioner moved for a new trial asserting as ground counsel's undisclosed conflict of interest. The trial court refused to grant petitioner an evidentiary hearing stating that counsel's

performance at trial, as observed by the court, comported with the standard set forth in **Moore** v. **United States**, 432 F.2d 730, 736 (3 Cir. 1970). The trial court misperceived the nature of petitioner's claim in utilizing **Moore** as the standard of review. The **Moore** standard has no applicability to conflict cases. **Moore** merely embodies the standard established by the Third Circuit for review of ineffective assistance of counsel claims in the context of the quality of conflict free representation. As will be discussed, **infra**, it is well-established that the analytical bases of conflict cases transcend ordinary notions of the competency of counsel's actual performance at trial. It bears observation that as part of his motion, petitioner presented to the trial court an affidavit of defense counsel indicating that counsel was unable to give his undivided loyalty and attention to petitioner's trial because of his personal problems.

Petitioner appealed denial of his motion for a new trial and his convictions to the Third Circuit. Petitioner argued that he was entitled to a new trial because of the adverse affect of coun-

sel's actual conflict of interest on the representation which he received and because counsel's failure to disclose an actual conflict of the sort which a criminal defendant cannot independently perceive is a per se violation of the Sixth Amendment right to intelligently select counsel. The Third Circuit, in a judgment order, affirmed denial of petitioner's motion for a new trial and his convictions. The order of the Court, however, specifically stated that the Court's failure to resolve petitioner's claim pertaining to violation of his right to conflict-free counsel on direct appeal was without prejudice to any claim which petitioner might raise collaterally.

In regard to the disposition fashioned by the Third Circuit, it bears note at this juncture that in the interim between denial of petitioner's motion for a new trial and the filing of his appeal, decisions of this Court and the Third Circuit were issued impacting upon the question of conflicted counsel. As will be discussed, infra, both of those opinions, Cuyler v. Sullivan, 100 S.Ct. 1709 (1980) and United States v. DeFalco, F.2d (3 Cir. 1979), (Decided Dec. 28, 1979), sup-

port petitioner's claim for relief and were analyzed in petitioner's brief to the Third Circuit. Unlike **Moore**, upon which the trial court relied, **Cuyler** and **DeFalco** are conflict cases and analyze the Sixth Amendment right to effective counsel in this context. **Sullivan** analyzes unobjected to conflicts in the context of multiple representation cases. **DeFalco** specifically reviews the impact of counsel's undisclosed personal conflict upon the representation received by in a criminal defendant. The conflict in **DeFalco**, like that in the instant case, was one which provided the prosecutor leverage upon counsel.

In refusing to reach the merits of petitioner's conflict claim despite its clear merit in light of **Cuyler** and the court's own opinion in **DeFalco**, the Third Circuit at argument expressed a concern that there had been no evidentiary hearing conducted pertaining to the conflict of counsel. It was, therefore, of the view that a factual record developed in the context of a hearing was a predicate to informed resolution of petitioner's claim. Counsel for petitioner indicated to the court that a petition for collateral relief

(Sec. 2255) would be required to be presented to the same judge who denied petitioner's motion for a new trial without a hearing. Further, in a post-argument brief, petitioner argued that there was a sufficient factual record upon which a decision on the merits could be made.[2] The sworn affidavits of petitioner and defense counsel established that petitioner was not informed of counsel's conflict as the target of an ongoing grand jury investigation and that the actual conflict adversely affected the quality of the representation which petitioner received. Further, the government did not in its Briefs refute that the prosecutor at trial was indeed aware of counsel's dilemma and, therefore, had the capacity to exert subtle forms of influence and intimidation upon him. The government also failed to volunteer any insight as to whether counsel was approached for his cooperation during the pendency of the inves-

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[2] Petitioner also relief upon an opinion of the Third Circuit which states that where a defendant has filed a motion for a new trial, which was denied without a hearing, he should not be required to return to the same court to raise the identical issue. See United States v. Swinehart, 617 F.2d 336, 340 (3 Cir. 1980).

tigation. It bears emphasis that the trial prosecutor was aware that defense counsel was the target of an ongoing grand jury investigation being conducted by his office. Counsel's conflict was clearly the sort which must be disclosed to the client and clearly adversely affects the representation. Petitioner submitted to the Third Circuit that since the facts as represented before the Court would not be altered, a collateral proceeding would in effect merely require that the District Court render a non-binding opinion as to the impact of this Court's opinion in Cuyler v. Sullivan, supra on the Third Circuit's opinion in United States v. DeFalco, supra.[3] The Third Circuit nevertheless relegated petitioner to a collateral proceeding.

C. The Necessity Of A Severance Or A Change Of Venue

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3. As will be discussed, infra, DeFalco embraced the opinion of the lower court in Sullivan which stated that the mere potential for conflicting loyalties was sufficient to render the representation ineffective. See United States ex rel. Sullivan v. Cuyler, 593 F.2d 512 (3 Cir. 1979). This Court's opinion in Cuyler reversed that opinion in the context of unobjected to conflicts in multiple representation cases. Cuyler requires a showing of an adverse affect on the representation. That adverse affect need not result in prejudice.

Codefendant Anthony Provenzano, as previously noted, is reputed to be the most powerful organized crime figure on the Eastern seaboard in the context of the ability to exert influence on organized labor. The trial was focused upon his notoriety and alleged capacity to control each of the East Coast Teamster's Unions. The government's major witness, Ralph Picardo, even claimed at trial that Provenzano could influence the Longshoremans' Unions. By the court's own admission, it was impossible to select a jury in the Newark area composed of individuals who were not aware of Provenzano's alleged domination of the unions and who would not focus their attention on Provenzano's exploits thereby failing to give fair consideration to the evidence against petitioner. Petitioner unsuccessfully urged his concern both prior to trial and on appeal to the Third Circuit that he could not receive a fair trial in Newark, New Jersey if jointly tried with Provenzano. The basis for the concern was that his conceded familiarity with Provenzano, and his brother's close ties to Provenzano, would obscure the paucity of evidence against him. Indeed, evi-

dence as to association, coupled with a jury saturated with individuals knowledgeable as to Provenzano's background, resulted in an unfounded conviction.

D. Distribution Of Marijuana To A Juror In Violation Of The Sequestration Order.

Marijuana was distributed to a juror by an individual who was not authorized by the sequestration order to visit the juror. Petitioner joined in a new trial motion challenging the use of marijuana by the juror in concert with another juror and its affect on them. The motion also questioned the actions of the trial court and the government in assuring the jurors that they and the distributor of the illicit drug would not be prosecuted. Petitioner argued to the trial court that the jurors developed a sense of obligation to the government as a result of the grant of transactional immunity. An unfavorable verdict, in the minds of the jurors, might well have resulted in retraction of the immunity. At the argument of the motion, the trial court ruled that the distribution and use of the marijuana and the corresponding grant of immunity were harmless.

The court improperly based its decision on an erroneous finding by it that the distributor of the marijuana was an authorized visitor within the terms of the sequestration order. Petitioner raised the arguments as to the perceived obligation to the government of the jurors because of the grant of immunity and the unauthorized nature of the visit in his appeal to the Third Circuit. With respect to the latter, petitioner argued that, because the visit was unauthorized, the visitor was not informed that he should not discuss the case or otherwise engage in conduct which might influence the juror's consideration of the cause. The visitor might therefore have engaged in such conduct rendering the trial unfair. The Third Circuit found no merit in this argument.

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The Jurisprudential Significance Of The Arguments To Be Raised Before This Court

Petitioner has selected three issues to be raised before this Court. Those issues relate to: (1) the failure of counsel and/or prosecutor to disclose to petitioner that defense counsel was a target of a Federal Grand Jury investigation in

the same Federal district as the trial; (2) the failure to grant a severance or a change of venue under the circumstances of this case and (3) the violation of the sequestration order which resulted in distribution of marijuana by an unauthorized visitor to a juror and perhaps in other improper influence upon the juror affecting her impartiality in the deliberations. We believe that each of these issues has national significance in the context of the development of fair and uniform trial procedures designed to ensure the constitutional integrity of verdicts in criminal cases. These claims are outlined below and detailed at length in the reasons for granting the writ.

A. The Issue As To Conflicted Counsel

As is demonstrated by the facts of the instant matter, there exists a precedential void respecting the disclosure obligations of the criminal bar where a member thereof becomes aware that he is a target of a grand jury investigation and, therefore, under an investigation by a law enforcement agency with which he may be required to deal on behalf of a client. The majority of

cases analyzing conflicts of interest have arisen in the context of multiple representation cases or in circumstances where the personal conflict of the attorney stems from a pecuniary interest in the ultimate disposition of the matter. Guidance to the bar as to the level of constitutionally required disclosure, where an attorney is called upon to try a criminal cause in a federal district in which he is the knowing target of a grand jury investigation, is an issue of national significance. This question should not be resolved by experimentation. A criminal defendant has no means to perceive such a conflict absent voluntary disclosure by counsel. Since "target status" has potentially grave consequences, it clearly has the capacity to render an advocate ineffective because of his concern for his personal interest. It also raises the spectre of improper influence and intimidation by the prosecutor. Absent disclosure to the client and a knowing decision to proceed, which would effect a waiver of the right to conflict-free counsel, the air of uncertainty as to the loyalty of counsel renders the trial suspect and casts a poll over the integrity of the pro-

ceeding. Because a criminal defendant will not discover the conflict until his cause has been tried, trials may be nullified because no clear rule of disclosure has been fashioned.

As importantly, this Court should fashion a rule of conduct pertaining to the obligations of any prosecutorial agency where it is actively investigating an attorney who is involved in the trial of a criminal matter which falls within the jurisdiction of the agency. In this regard, a cogent interpretation by this Court of the general principles articulated in Holloway v. Arkansas, 435 U.S. 475 (1978) and Glasser v. United States, 315 U.S. 60 (1942) and applied in Cuyler v. Sullivan, supra, as those principles pertain to the instant circumstances will provide clarity to an unsettled area of the law relating to conflicted counsel. In Sullivan, supra, the inquiry obligations of the trial court and its general supervisory responsibilities in the context of multiple representation cases was settled. Sullivan also answered the issue as to the level of prejudice necessary to underpin the granting of a new trial on appeal where the criminal defendant fails

to object to a conflict stemming from multiple representation at trial. The principles of analysis in Holloway and Glasser as evolved in Sullivan are ripe for application to conflicts of the type in the instant case.

B. The Issue As To Severance Or A Change Of Venue

Persons in petitioner's position, who confront joint trial with an individual of great negative reknown in a particular jurisdiction, are provided no protection within prevailing jurisprudence relating to severance and change of venue. With particular regard to petitioner, the court, like the jurors who were all preoccupied with the presence at trial of Provenzano, did not perceive the danger to petitioner of improper conviction on the basis of association. The evidence against petitioner was wholly inconclusive and the link between trial and conviction was provided exclusively by his admitted familiarity with Provenzano. This Court must issue a statement which will mandate recognition of the fair trial rights of the little man who is sought to be tried with an individual whose shadow at trial will obscure

adequate consideration of the evidence against him. Such an individual's rights may not be disregarded in the zealous effort to bring to justice the celebrity object of the prosecution. All too often individuals are wrongfully injured because of associations.

C. The Violation Of The Sequestration Order

Our system of justice clearly cannot condone the cavalier treatment of the violation of the sequestration order by the lower courts. The unauthorized visitor distributed an illicit substance to a juror and might well have discussed the case. At a minimum, an evidentiary hearing was required to determine whether any such discussions occurred. The lower courts ignored this critical element of petitioner's right to a fair trial. See Turner v. Louisiana, 379 U.S. 466 (1965).

Reasons For Granting The Writ

Point I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUES AS TO WHETHER AN ATTORNEY'S KNOWING STATUS AS THE TARGET OF A GRAND JURY INVESTIGATION IN THE SAME DISTRICT AS TRIAL IS AN ACTUAL CONFLICT WHICH MUST BE DISCLOSED TO THE CLIENT AND WHETHER AFFIRMATIVE CONCEALMENT OF THE ACTUAL CONFLICT IS A PER SE VIOLATION OF THE FIFTH AMENDMENT RIGHT TO DUE PROCESS AND THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. THIS COURT SHOULD ALSO DETERMINE WHETHER THE PROSECUTOR AND THE COURT HAVE AFFIRMATIVE DUTIES OF INQUIRY AS TO WHETHER THE CONFLICT WAS DISCLOSED IN CIRCUMSTANCES WHERE THEY ARE AWARE OF THE TARGET STATUS OF DEFENSE COUNSEL.

A.

Introduction

i. Prior Precedent As To Conflicts

In Holloway v. Arkansas, 435 U.S. 475 (1978), this Court considered a case in which appointed counsel was required over objection to represent three criminal defendants in a joint trial. Relying on earlier precedent established in Glasser v. United States, 315 U.S. 60 (1942),

the Holloway Court began its analysis by stating that multiple representation is not per se violative of the constitutional guarantees of effective assistance of counsel. That predicate statement was based on an awareness that multiple representation is not always a conflict. 435 U.S. supra at 482. However, again specifically relying on Glasser, the Holloway Court ruled that it was error in the case before it to fail to appoint separate counsel. The Holloway Court iterated the principle of Glasser that it is a court's duty to refrain from insisting that an attorney undertake to concurrently represent interests which diverge from those of his client, when the possibility of that divergence is brought home to the court. 435 U.S. at 485. (emphasis added). In answering the question as to whether the error was sufficiently prejudicial to mandate reversal of the convictions, the Holloway Court ruled that "whenever a trial court improperly requires joint representation over timely objection, reversal is automatic." 435 U.S. at 488. (emphasis added). See Glasser v. United States, 315 U.S. at 75-76. The Holloway Court rejected any notion that the

defendant be required to demonstrate specific prejudice. Any such rule, stated the Holloway Court, "would not be susceptible of intelligent, even-handed application." 435 U.S. at 490.

In Cuyler v. Sullivan, __U.S.__, 100 S.Ct. 1709 (1980), this Court granted certiorari to consider recurring issues left unresolved in Holloway v. Arkansas, supra. Those unresolved issues were: (1) whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection and (2) whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel. With respect to the first question, the Cuyler Court ruled that a trial court's duty of inquiry is limited to investigation "of timely objections to multiple representation." 100 S.Ct. at 1717 . The Cuyler Court placed the ethical obligation upon defense counsel "to avoid conflicting representation and to advise the court promptly when a conflict of interest arises during the course of trial." 100 S.Ct. at 1717. In this context, a trial court is, "[a]bsent special circumstances...[permitted] to

assume that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." 100 S.Ct. at 1717 . (emphasis added). Stated somewhat differently, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." 100 S.Ct. at 1717.

With respect to the second issue, the Cuyler Court ruled that "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 100 S.Ct. at 1718. In interpretating this requirement the Cuyler Court emphasized, consistent with its decisions in Holloway and Glasser, that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 100 S.Ct. at 1719 . The Cuyler Court cited as an example of adverse affects on a defendant's representation the failure of counsel in Glasser to cross-examine a witness because of the conflict. Under the rule set forth: Cuyler, there need be

no prejudice stemming from the failure.

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The Uncertainty As To Application Of The Principles Of Holloway and Cuyler In Cases Involving Wholly Personal Conflicts.

The law in the area of conflicts, particularly the decisions of this Court, have centered upon an analysis of multiple representation cases. Such cases are distinct from cases involving conflicts of a wholly personal nature. Moreover, although multiple representation cases do not always pose an actual conflict of interest, the mere fact of multiple representation alerts the court that there is a potential for a conflict and also in most jurisdictions requires that the attorney disclose the potential pitfalls to the client. Multiple representation also operates as a signal to the defendant where he perceives his interests to be at odds with those of his codefendant. See Cuyler v. Sullivan, supra at 1718; State v. Bellucci, 81 N.J. 531, 410 A.2d 666 (1980). Contrarily, where an attorney is laden with a wholly personal conflict, there is no factor on the surface to alert either the court or the defendant that there is a potential for a division of loyal-

ties. The responsibility for a decision as to disclosure, therefore, in the absence of some other factor imparting knowledge to the court or prosecutor, rests entirely with the integrity of counsel. In the instant case, counsel was the knowing target of a Federal Grand Jury investigation in the same Federal district as trial. With the exception of canons of ethics which are drafted in general terms, there was no available guidance to counsel as to his disclosure obligations.[4]

As importantly, the prior multiple representation decisions of this Court analyze the issue as to the adverse affect on the representation in terms of noticeable lapses attributable to the conflict. Demonstration of a noticeable adverse affect obviates any need for prejudice under the

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4. For example, DR2-10(B)(3) requires mandatory withdrawal by an attorney where "his mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively." DR-105(A) requires that an attorney disclose any fact to a prospective client "if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own...personal interests." Counsel subsequently admitted that his conflict rendered him mentally unfit to carry out the employment effectively. He expressed regret that he had not withdrawn from the case.

analysis set forth in Cuyler. In multiple representation cases ordinarily it is possible to ascertain from the record a sufficient distinctness between the interests of the separate defendants upon which findings as to adverse affects may be based. Where the attorney's conflict and the effects thereof are wholly internalized within himself and multiple defendants are not involved, there is no basis for comparative analysis of probable tactical bases for his actions. The attorney's acts or omissions can only be judged in terms of the probable effect of the conflict upon his ability to provide unfettered and untrammeled representation. See Glasser v. United States, supra at 76.

It is our considered opinion that in addition to the Sixth Amendment right to effective assistance of counsel, the Fifth Amendment right to due process is also violated when an attorney conceals an actual conflict of interest. In his capacity as an officer of the court, an attorney has an obligation to inform the court of any conflict which has the clear potential to affect the integrity of the proceeding. In the instant case,

both the prosecutor and defense counsel were alerted to this clear and unmistakable possibility. Each of these parties was required to seek the guidance of the trial court. To ensure that this responsibility is adhered to in future cases, this Court must fashion clear rules as to the duty of disclosure by officers of the court and the duty of inquiry by the court where it is informed of a personal conflict such as that in the instant case. This Court must also issue a statement as to the criminal defendant's burden of proof on appeal in arguing that a conflict such as that below violated his Sixth Amendment right to effective assistance of counsel. Petitioner also believes that this Court has recognized a Sixth Amendment right to intelligent selection which was violated in this case by the failure to disclose the actual conflict. Some statement is required as to applicability of that right, as set forth in Powell v. Alabama, 287 U.S. 45, 53 (1932), in circumstances where an actual personal conflict was concealed.

A. Trial Counsel's Failure To Advise Petitioner That He (Counsel) Was Under Investigation

By A Federal Grand Jury In The Same District As Trial Violated Petitioner's Right To Exercise An Intelligent Choice In Selecting His Counsel.

It is critical to the right to counsel that a criminal defendant be provided the counsel of his choice. That choice must be predicated on sufficient information concerning conflicts affecting counsel to ensure that it is freely exercised. Where a counsel conceals an actual conflict, and the government's inaction facilitates the concealment, the petitioner's right to intelligent selection of counsel is clearly violated. In this case, trial counsel's status as a target of an ongoing grand jury investigation in the same district in which the trial was pending was an actual conflict which requires a knowing and intelligent waiver.

In Powell v. Alabama, supra, the seminal opinion in regard to intelligent selection of counsel, the United States Supreme Court stated "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice." Cf. United States v. Burton, 584

F.2d 485, 489 (D.C. Cir. 1978), cert. den. 99 S.Ct. 89 (1978). In Powell, the facts revealed a denial of "a reasonable time and opportunity to secure counsel." 287 U.S. at 71. The Powell Court's opinion formed the foundation for the principle of modern law that the right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of the right with the most exacting scrutiny. See, e.g., Zuck v. Alabama, 588 F.2d 436, 439-440 (5 Cir. 1979).

The mandate of Powell that a defendant be provided sufficient opportunity to intelligently select counsel stemmed from acts by the trial judge which deprived the defendants in that case of choice with respect to counsel. See, Powell v. Alabama, supra. That holding was subsequently expanded, consistent with the high-standing of the right, to encompass acts or omissions on the part of the attorney whom a defendant has chosen. See, Glasser v. United States, 315 U.S. 60, 70 (1942). Since Powell, our courts have consistently recognized that the right to intelligently select counsel may be violated by an attorney

who agrees to represent a defendant absent a full disclosure of potential deficiencies in his ability to provide undivided attention to the defendant's case. See e.g., Holloway v. Arkansas, supra; United States v. Truglio, 493 F.2d 574, 579-580 (4 Cir. 1974); Sawyer v. Brough, 358 F.2d 70, 73-74 (4 Cir. 1966).

Our research indicates that in present jurisprudence respecting conflicts of interest a rule is emerging that the failure to advise a defendant of an actual conflict is a per se violation of the Sixth Amendment and is inherently prejudicial. United States v. Alvarez, 580 F.2d 1251 (5 Cir. 1978), is instructive in this regard. In Alvarez, the Court distinguished actual conflicts from merely hypothetical or speculative conflicts. For example, joint representation, as noted previously, is not a per se violation of the Sixth Amendment right to intelligent selection of counsel because it does not necessarily entail a conflict. 580 F.2d at 1255. And, this Court has fashioned a presumption of disclosure in the context of multiple representation cases which is

predicated on the broad awareness that the potential for detriment is always present. Cuyler v. Sullivan, supra at 1718 . See, Foxworth v. Wainright, 516 F.2d 1072, 1076-1077 (5 Cir. 1975); United States v. Fannon, 491 F.2d 129, 132 (5 Cir. 1974), cert. den. 419 U.S. 1012 (1974). The Alvarez Court stated that a violation occurs "if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents - as a vigorous advocate having the single aim of acquittal by all fair and honorable means - are hobbled or fettered or restrained." 580 F.2d at 1254.[5] This rule is one of necessity in the context of conflicts of the sort which are wholly personal and undiscoverable by the client absent disclosure.

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5. Cf. Castillo v. Estelle, 504 F.2d 1243 (5 Cir. 1974) (Conflict created by defense counsel's simultaneous representation of prosecution witness); Porter v. United States, 298 F.2d 461 (5 Cir. 1962) (Conflict in defense counsel's simultaneous representation of a potential witness who could establish the defense of entrapment, but who could not be called to testify without implicating himself); Mackenna v. Ellis, 280 F.2d 592 (5 Cir. 1960), mod. 289 F.2d 928, cert. den. 368 U.S. 877 (1961) (Conflict in defense counsel's relationship with the district attorney).

A paramount concern of the law in the area of conflicts is protection of the right to intelligent exercise of choice. However, it should be emphasized that in exercising the right of choice, an accused may waive his right to conflict-free counsel, United States v. Alvarez, supra at 1259. Cf. Gray v. Estelle, 574 F.2d 209, 213 (5 Cir. 1978). Any such waiver must be knowingly and intelligently made. United States v. Mahar, 550 F.2d 1005, 1009 (5 Cir. 1977). Indeed, it has been stated that the defendant must affirmatively assert his or her decision to forego conflict-free representation. Id. In Mahar, supra, the Court stated that the judge must elicit from the defendant in narrative form a statement indicating his awareness of an actual conflict and comprehension of the situation and its implications and expressing the defendant's decision whether to proceed with the conflicted counsel or with new counsel. 550 F.2d at 1009.[6]

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6. The right to choice is of such magnitude that a reversal may be required in the event that the court disqualifies a conflicted counsel over the objection of defendant. In United States (Cont'd)

Of course the analysis in **Mahar** assumed disclosure of the conflict.

In the instant case, petitioner was wholly unaware of trial counsel's actual conflict. Trial counsel knew two months in advance of trial that he was under investigation by a federal grand jury. He at no time informed petitioner or the court that he was in a duplicitous position as petitioner's trial counsel and a target of an ongoing grand jury investigation. Had counsel informed him, petitioner would have been able to give his "knowledgeable assent" to counsel's continuation or retained substitute counsel. A knowing and intelligent waiver of the right to conflict-free counsel would have precluded relief on appeal. However, under the circumstances now existing it is clear that petitioner was deprived of the freedom to choose "an unhobbled, unfettered and unrestrained" counsel. See, **United States v. Alvarez**, supra.

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v. Laura, 607 F.2d 52 (3 Cir. 1979), the trial court had a conflict with counsel and disqualified him. The appellate court ruled that the court should have disqualified itself.

A recent opinion of the Third Circuit supports the conclusion that trial counsel confronted a conflict of the sort which a defendant must be informed in order to exercise intelligent choice. That opinion, **United States v. DeFalco**, F.2d (3 Cir. 1979), (decided December 28, 1979), states that it is essential that "the advocate owe no fealty that conflicts, or even appears to conflict." (Slip Op. at 11). In **DeFalco**, appellate counsel was indicted and entered into plea negotiations during the pendency of the appeal. The **DeFalco** Court noted that the conflict is clearly drawn where trial emanates from the same district in which the attorney is under investigation by the grand jury and where the lawyer and client are being processed by the same United States Attorney's Office. (Slip Op. at 11). The **DeFalco** Court ruled that in the context of the conflict before it, the "potential for conflicting loyalties" was sufficient to undermine the representation.[7]

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7. We emphasize that a conflict of this nature is heightened where it arises regarding trial counsel. An appellate attorney has a finite record upon which to predicate an appeal. (cont'd)

We submit that the trial counsel's failure to advise petitioner of his actual conflict violated petitioner's right to an intelligent choice of counsel. Under no analysis can this violation be treated as harmless. Chapman v. California, 386 U.S. 18, 43 (1967).

B. As An Officer Of The Court Counsel's Failure To Inform Both The Court And Appellant Of His Personal Conflict Violated Petitioner's Fifth Amendment Right To Due Process.

As an officer of the court, counsel had an obligation to come forward and to inform it of any circumstances which had the capacity to im-

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Scrutiny of his efforts is therefore possible in a real sense. Trial is the formation of a record upon which the entire action will be based. The attorney's demeanor, personality, zeal and subtle gestures are impressions that contribute to a finding of guilt or innocence. Contrarily, on appeal, the law may be noted and applied by the government (which has a duty to note prejudicial error) or the clerks of the appellate court. In any event, it is plain that the potential for intimidation of the attorney by the prosecutor and the disabling mental affect on counsel of the actual conflict deprived petitioner of effective representation. See Part C, infra. It is that potential, coupled with the severe mental and psychological disability, which distinguish conflicts of this sort from multiple representation cases. The analysis in Cuyler, thus, does not incorporate these considerations.

pair the integrity of the trial, particularly with respect to his client. Counsel, during trial, was the target of a grand jury investigation into crimes of fraud, deceit and misrepresentation. Counsel's failure to apprise the court violated petitioner's Fifth Amendment right to due process. Counsel's failure also precluded the trial court from performing its "duty to maintain proper standards of performances by attorneys who are representing defendants in criminal cases." United States v. Pinkney, 551 F.2d 1241 (1977).

It is not an easy task to fulfill the responsibilities which an attorney accepts when he becomes a member of the bar and concomitantly an officer of the court. See, e.g., Lowery v. Cardwell, 575 F.2d 727, 731 (9 Cir. 1978) (In the representation of a defendant the integrity of the judicial process requires that an attorney not lend aid to what is believed to be a perjurious defense); United States ex rel. McClindon v. Warden, Ill. St. Pen., 575 F.2d 108, 114 (7 Cir. 1978) (The primary responsibility for avoidance of a professional conflict of interest rests with the bar); United States v. Kidding, 560 F.2d

1303, 1310 (7 Cir. 1977), cert. den. 98 S.Ct. 217 (1977) (The duty of informing defendants of conflicts is imposed on attorneys, as officers of the court). Nonetheless, it is essential to the entire process that attorneys shoulder this responsibility. Where an attorney fails to come forward and apprise the court and the defendant of the conflicting personal interests, the trial is fundamentally unfair and violates due process. Zuck v. Alabama, supra at 438.

Zuck v. Alabama, supra, is particularly apposite. In Zuck, the law firm which had been retained to represent the defendant also represented the prosecuting attorney in an unrelated civil matter. The Zuck Court deemed this to be an actual conflict. More importantly, the Zuck Court found that, as an officer of the court, the attorney's action in concealing this fact from defendant was sufficient in itself to violate due process. 588 F.2d at 439. The Zuck Court also stated that where an actual conflict exists, it need not be shown that the divided loyalties actually prejudiced the defendant in the conduct of his trial. 588 F.2d at 439. See Part C, infra.

United States v. Alvarez, supra, is similarly apposite. The Alvarez Court stated:

> Where a conflict of interest has been allowed to occur, either through a calloused conscience of the attorney, or ignorance of the true facts by the Judge, the trial is not the fair one demanded by the Constitution. And this is without regard to the presence or absence of any action of a strictly governmental nature which can be ascribed to the prosecution as the transgressing agency or imputed to the trial court on traditional notions of error on the judge's part. [580 F.2d at 1256] (emphasis added).

Thus, in his capacity as an officer of the court, it is firmly established that a private attorney individually violates a defendant's due process rights by failing to disclose an actual conflict. The prosecutor contributed to the failure in this case by failing to apprise the court.

In the instant case, trial counsel failed to fulfill his responsibility as an officer of the court. This failure to advise the court and petitioner of an actual conflict of the sort which indicates a division of loyalties rendered the trial fundamentally unfair and violated petitioner's due process rights requiring a reversal of the convictions.

C. As A Matter Of Law An Attorney Who Fails To Disclose An Actual Personal Conflict Of The Sort At Issue In The Instant Case Thereby Precluding Any Waiver Of The Right To Conflict-Free Counsel Is Ineffective Within The Intendment Of The Sixth And Fifth Amendments.

A criminal defendant's rights to effective assistance of counsel as guaranteed by the Sixth (right to counsel and a fair trial) and Fifth(due process) Amendments are violated by an attorney's failure to disclose an actual conflict of the sort at issue in the instant case. There is no means to assess from the record specific adverse affects on the representation because those affects stem from the internalized motivations of counsel. Counsel, however, has conceded that he was so emotionally disturbed that he was unable to give his undivided attention to petitioner's case.

Trial counsel and the prosecutor concealed this status from petitioner and presumably from the court for in excess of two months prior to trial and for an additional period of months thereafter. As a matter of law his failure to disclose this actual conflict, to facilitate an intelligent scrutiny of his ability to perform both

by the court and petitioner, rendered him ineffective as a matter of law. Petitioner had an unequivocal right to counsel's withdrawal. In our view, an attorney exercising "the customary skill and knowledge which normally prevails at the time and place" would have disclosed the actual conflict to the court and petitioner. See, Moore v. United States, 432 F.2d 730, 736 (3 Cir. 1970). Cf. Part B, supra. At this point it cannot be ascertained whether the mental and psychological pressures attendant to the status as a target of a grand jury investigation in the same district as trial caused trial counsel to do or omit to do some act which would have turned the tide in petitioner's favor.[8] It is also impossible to gauge whether the prosecutor exerted significant levels of intimidation toward counsel.

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8. This case is distinct even from cases such as United States v. Hearst, F.2d (9 Cir. 1980), where the court found entry into a book publishing contract to be an actual conflict. Certain tactical decisions at trial tended to bolster the production of materials for the book, e.g. the defendant's testimony. No such concrete adverse affect is readily discernible in the instant case.

Counsel's failure to apprise petitioner precluded assumption by him of the risk that trial counsel could resist a division of loyalties, namely his duty to petitioner and his concern for his own welfare. The representation accorded to petitioner, thus, must be presumed as a matter of law to have been ineffective.

As noted in United States v. DeFalco, supra, the Third Circuit analyzed an analogous problem in detail. The defendant in DeFalco was aware that his appellate counsel had been indicted. Counsel conveyed the impression to the defendant that the indictments were without justification and he would be vindicated. Thereafter, counsel in DeFalco entered a plea of guilty (Slip Op. at 3-4). As previously noted, petitioner in the instant case had no knowledge whatsoever of trial counsel's status. The DeFalco Court stated that reversal is required in this setting upon a showing of "a possible conflict of interest or prejudice, however remote." (Slip Op. at 8). The standard set forth in Moore, supra, for review of the ordinary case, namely "customary skill," was ruled to be inapplicable. We per-

ceive, nonetheless, that the instant circumstances even transgresses the Moore standard since there is inherent incompetency curable only by a waiver of the right to conflict-free counsel.

The stricter standard applied by the DeFalco Court was "based upon a recognition that, in cases involving a conflict of interest, it is often difficult or impossible to determine whether the defendant has actually been prejudiced by improper representation." United States v. DeFalco, supra, slip op. at 8. The DeFalco Court drew this standard from Holloway v. Arkansas, 435 U.S. 475, 490-491 (1978). In Holloway, prior to Cuyler, this Court stated:

> [T]he evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing...It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the (trial) available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. [435 U.S. at 490-491].

In applying the teaching of Holloway to the facts in DeFalco, the DeFalco Court discussed

at length the necessity to the adversary system that counsel be untrammeled and unimpaired. See, Glasser v. United States, supra at 70. The DeFalco Court stated:

> If there is any constraint on counsel's complete and exuberant presentation, our system will fail because the basic ingredient of the adversary system will be missing. The essence of the system is that there be professional antagonists in the legal forum, dynamic disputants prepared to do combat for the purpose of aiding the court in its quest to do justice. Therefore, if any circumstance impedes the unqualified participation from any attorney, the adjudicatory function is inhibited, ultimately threatening the object of that function, justice in the case at hand. (Slip Op. at 10). (emphasis added).[9]

The Court in DeFalco recognized that personal conflicts entail more direct affects on counsel. That court concluded that "inherent emotional and psychological barriers created an imper-

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9. In DeFalco, this Court further stated "that the competent advocate must stand tall...and assert his client's contentions without fear or favor." (Slip Op. at 11). In this context, we emphasize that one of the major dangers in this type of case is attorney intimidation by the prosecution. It cannot be overstated that this was a concrete possibility in the instant case. See United States v. Calacurio, 499 (cont'd)

missible potential of preventing counsel from competing vigorously with the government." (Slip Op. at 11). The general principle in Holloway supported this analysis and in the context of this case survive the statements in Cuyler pertaining to adverse affects of the representation. In the instant circumstances, adverse affects are virtually impossible to discern from the record.

United States v. Alvarez, supra, further illuminates the philosophical underpinning of the ruling in DeFalco that it would be inappropriate to require a demonstration of an adverse affect above and beyond the existence of the unwaived conflict. The Alvarez Court noted the incalculable detriment. The Court stated:

> Unlike competency of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself. 508 F.2d at 1256-1257 (emphasis added).

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F.2d 1404 (9 Cir. 1974); In re Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966).

Similarly, in Zuck v. Alabama, supra, it was stated:

> If such an actual conflict exists, it need not be shown that the divided loyalties actually prejudiced the defendant in the conduct of his trial...When there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice. [588 F.2d at 439] (emphasis added).

See Castillo v. Estelle, supra at 1245; Goodson v. Peyton, 351 F.2d 905 (4 Cir. 1965). Cf. Glasser v. United States, supra.

Implicit in the foregoing is that the constitutional violation in this case, and the necessity of a reversal, is established without reference to discernable adverse affects such as those which are often apparent in multiple representation cases. The rule in Cuyler therefore as to unobjected to conflicts in multiple representation

cases is not controlling in this context. Wholly personal, internalized conflicts are different and require a separate analysis. The instant conflict is per se prejudicial. In this regard, the clear and unmistakable potential for a division of loyalties, absent full disclosure to petitioner, rendered trial counsel ineffective as a matter of law. Adverse affects, in terms of factual explication discernible from the record, are not the hallmark of such conflicts. There is no means through which a reviewing court may ascertain whether trial counsel was hampered by his conflicting personal interests therefore adversely affecting the representation. See, Woytowicz v. United States, 550 F.2d 756 (2 Cir. 1977); United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976); United States ex rel. Simon v. Murphy, 349 F. Supp. 818 (E.D. Pa. 1972); Commonwealth v. Duffy, 394 A.2d 965 (Pa. Sup. Ct. 1978). Similarly, there is no basis for a finding that he was not. Accordingly, any doubt must be resolved in favor of petitioner. United States v. DeFalco, slip op. at 9.

D. The Record Indicates A Lack Of Zeal On The Part Of Trial Counsel And Certain Tactical Decisions Which May Have Been Attributable To His Inattention And Distraction.

Although a showing of specific adverse affect is not in petitioner's view required in cases of this type, it is instructive to set forth certain obvious omissions by trial counsel. These omissions indicate that he lacked zeal in representing petitioner. Trial counsel failed to emphasize in his cross-examination of Ralph Picardo that petitioner was not associated with the union which was allegedly controlled by the criminal enterprise. Petitioner was, in fact, an officer of another union. Trial counsel elicited a repetition of the damaging portion of the testimony without any development of the ultimate exculpatory fact. Moreover, counsel desisted in his efforts to highlight that Picardo did not include petitioner as a member of the enterprise in previous testimony before various grand juries, ostensibly in deference to off the record pressure from the attorneys for codefendants to the effect that this line of questioning would leave them "wide open on redirect." Further, although the evi-

dence against petitioner was scant and ambiguous, counsel did not carefully sift through the testimony of Picardo during his summation to the jury. Particularly, trial counsel at no time stated that there was no evidence that appellant had any knowledge of activities of the criminal enterprise. In this context, it is highly probative that although petitioner had no prior record counsel advised him not to testify. Petitioner's testimony was essential to explain the ambiguities as to his association with codefendants and his relationship with his brother for whom he transmitted messages. Petitioner's testimony might well have turned the tide in his favor. These omissions are sufficient to indicate that counsel was at a minimum impaired in his representation of petitioner.

Point II

CERTIORARI SHOULD BE GRANTED TO FASHION PRECEDENT PERTAINING TO THE SEVERANCE AND CHANGE OF VENUE RIGHTS OF LITTLE KNOWN PERSONS WHO ARE SOUGHT TO BE JOINTLY TRIED WITH NOTORIOUS INDIVIDUALS IN A JURISDICTION WHERE IT IS IMPOSSIBLE TO SELECT A JURY COMPRISED OF INDIVIDUALS WHO ARE NOT FAMILIAR WITH THE NOTORIOUS INDIVIDUAL.

The evidence against petitioner was both slight and ambiguous. Indeed, there was no evidence that he knowingly participated in the conspiracy. Due to this paucity of evidence there was an extreme danger that he would be unduly prejudiced by a joint trial with Anthony Provenzano. Simply put, Provenzano loomed so large in the trial the jury was likely to be unable to give the evidence against petitioner sufficient individual consideration. Mere association with Provenzano had the capacity and did, in fact, steer the jury toward a finding of guilt. The jury was drawn in a vicinage where the court itself acknowledged it would be impossible to select 12 jurors who were not familiar with Provenzano and his notorious exploits. The court violated peti-

tioner's right to a fair trial in denying his motion severance or a change of venue. Severance or a change of venue was the only means to ensure that petitioner would not be prejudiced by the highly publicized, anti-hero status of Provenzano. In denying these motions, the court precluded the possibility of selection of a jury which would fairly consider the evidence against petitioner.

A. Under The Circumstances Of This Case Petitioner Could Not Without Prejudice Be Jointly Tried With Anthony Provenzano In The Vicinage Chosen By The Court. Accordingly, A Severance Was Required.

A trial court's duty to sever when prejudice appears continues throughout trial. United States v. Crawford, 581 F.2d 489, 492 (5 Cir. 1978). Stated somewhat differently, where a defendant makes a substantial showing of possible prejudice in support of his pretrial motion for severance, such a showing remains a factor to be kept in mind by the trial court as trial progresses. United States v. Mardian, 546 F.2d 973, 979 (D.C. Cir. 1976). The interests in expeditious adjudication of criminal cases and in judicial economy, upon which joinder is based, at no time outweigh

the defendant's interest in a fair trial. United States v. Veloz, 421 F.Supp. 1266, 1267 (E.D. Wis. 1976). Cf. Fed. R. Crim. Proc. 14; United States v. Smith, 550 F.2d 227, 283 (5 Cir. 1977), cert. den. 434 U.S. 841 (1977) (Severance mid-trial is appropriate measure to protect rights of defendant in joint trial); United States v. Knowles, 572 F.2d 267, 270 (10 Cir. 1978) (Unsavory and highly-publicized reputation of codefendant may be ground for severance); United States v. Sanders, 563 F.2d 379, 383 (8 Cir. 1977), cert. den. 434 U.S. 1020 (1977) (Where evidence as to each defendant in a conspiracy trial is mostly separate severance mid-trial is appropriate).

The ultimate question as to severance is whether under all the circumstances, as a practical matter, it is within the capacity of the jurors to follow admonitory instructions and accordingly collate and appraise independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. United States v. Campanale, 518 F.2d 352, 359 (9 Cir. 1975), cert. den. 423 U.S. 1050 (1975). In the instant case, it is clear in view of the circum-

stances that the jury as constituted was ill-disposed to give petitioner sufficient independent consideration.[10] The jurors were literally primed

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The trial and pretrial proceedings were extensively covered by the local press. Numerous prospective jurors, including at least three who ultimately decided the case acknowledged on voir dire having listened to a radio announcement that very morning that jury selection in the Anthony Provenzano case would commence in Newark that day. Other prospective jurors also admitted having heard radio newscasts relating to Anthony Provenzano, including Mr. Clark, who was to sit in judgment.

Other prospective jurors, including Mr. Weingartner who also was to be a trial juror, read in the morning's papers that the Anthony Provenzano jury would be selected. Others who were selected had previously been exposed to stories about Anthony Provenzano in the print media (e.g., Ms. Shipner read something "that had to do with labor and that he was involved in some criminal proceedings.") Mr. Sadvary knew that "Tony Pro has been in the paper on and off and on pretty regular. You know, the past year...something to do with rackeetering."

The Bergen Sunday Record, whose circulation predominates north of Newark, had commenced in its issue of November 19, 1978, a four-part series entitled "A Road Paved With Corruption." The first installment subtitled "How the Mob runs the Teamsters, and how the public gets hurt" was an "expose" of the alleged manner in which unions and trucking firms are infiltrated by the Mob, the Teamsters, and Anthony Provenzano. In the Record those terms are virtually interchangeable. The article in question which was given featured status in the "Opinion" section, included on page D-1 an organizational chart of allegedly mob-infiltrated unions. The inset was a large picture of Anthony Provenzano, together with lesser pictures of two of the co-defendants at trial. At

by the media to sit in judgment of Anthony Provenzano, who they were aware allegedly exercised iron-clad control over the New Jersey labor unions through manipulation of his many minions. Had there been concrete and unequivocal evidence of petitioner's complicity, the prejudice would not have been so great. However, as it were, the jury was required to closely scrutinize the individual participation of petitioner to find guilt even on the basis of tenuous inference. The jury's perception was that it was sitting at Tony Provenzano's trial, not petitioner's.[11] If Proven-

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10 (Footnote continued from previous page)

least one prospective juror, James Davidson, recalled seeing "Something to do with the union and the tie-ins and things like that. People's pictures and organizational charge." Mr. Davidson thought he had seen this in the New York Times but prosecutor Speiser assured the Court that no such chart had appeared within memory in the Times. Mr. Davidson acknowledged that he sometimes reads portions of the Newark Star Ledger and the Bergen Record. Undoubtedly, his recollection was of the November 19, 1978 Record, which was published less than six months before the voir dire.

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Consistent with the media status of the trial below, the government called 45 witnesses in its case-in-chief. These included Ralph Picardo, executives of Seatrain and Interocean, truck driv-

(footnote continued)

zano was guilty, so was to be petitioner. This fact was evident at the incipiency of the trial and became glaring as trial progressed. The court should have granted severance at the end of the State's case to cure its earlier error.

We submit that justice required that petitioner be severed. He could not, and did not, under the prevailing circumstances receive adequate "collation and appraisal of the independent evidence against him." United States v. Campanale, supra.

B. At A Minimum A Change Of Venue Was Required.

Where it is impossible in a particular vicinage to draw a jury which has the capacity to adequately compartmentalize the evidence as to each of the defendants in a joint trial, a change of venue is the sole remedy short of severance of the affected defendant. See, United States v.

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11 (Footnote continued from previous page)

ers, a labor contract expert, Paulette Compton, accountants, employees of Ralph Picardo, and F.B.I. agents. There were only two witnesses, Ralph Picardo and Thomas B. Thompson, the Government's fingerprint expert, who gave any substantive evidence relating to petitioner Briguglio.

Mandel, 431 F.Supp. 90, 100-101 (D. Md. 1977). Cf. United States v. Capo, 595 F.2d 1086, 1090 (5 Cir. 1979) (Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, as a change of venue).

As noted, in the instant case, as to petitioner, an impartial and attentive jury could not be drawn because of the aura of joint trial with Anthony Provenzano.[12] See, United States v.

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The District Court's approach was to defer a ruling until after attempting to select a jury. The court was aware prior to attempting to select a jury that there existed a probability of unfairness. The purpose of a change of venue is to select a jury from a region where pretrial publicity has been less extensive or less prejudicial. "If change of venue and continuance are to be of value, they should not turn on the results of the voir dire; rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the voir dire standing along." ABA, Standards Relating To A Fair Trial And Free Press, Commentary to Sec. 3.2 at 127 (1968). The voir dire, however, reinforced the pervasiveness of the publicity. The Court below, however, fell prey to the unfortunate but not infrequent reluctance of judges "to admit that justice is absent in their jurisdiction." Austin, Prejudice and Change of Venue, 68 Dick. L. Rev. 401 (continued)

Cepeda Penes, 577 F.2d 754, 757 (1 Cir. 1978); United States v. Pomponio, 563 F.2d 659, 665 (4 Cir. 1977), cert. den. 435 U.S. 942 (1977). At a minimum a change of venue was required in the absence of severance. Petitioner was unduly and fatally prejudiced by the jury's unmistakable focus on Provenzano.

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12 (footnote continued from previous page)

(1964). This in spite of its repeated acknowledgement that any jury would be primed to try Provenzano.

Point III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE AS TO THE SIGNIFICANCE AND VIOLABILITY OF SEQUESTRATION ORDERS. THE CAVALIER TREATMENT OF THE UNAUTHORIZED VISIT IN VIOLATION OF THE SEQUESTRATION ORDER BY THE LOWER COURTS DENIGRATES THE PERCEIVED IMPORTANCE OF SUCH ORDERS

Petitioner was denied his Sixth Amendment right to a fair trial and to an impartial jury by virtue of criminal conduct engaged in by certain sequestered jurors, namely illegal possession and use of marijuana and by violation of the sequestration order. The court released the jurors from liability and biased those jurors in favor of the government. The most salient aspect of the Sixth Amendment violation is the fact that the marijuana was distributed to the juror by an individual who visited her in violation of the sequestration order. The order restricted visits to close family members and persons with whom the juror shared a spousal relationship. At the new trial motion it was erroneously assumed that the source of the drugs illegally passed to the juror was a permitted person. However, there was no

evidence that this was the mother or father of this single female juror who lived at home. Accordingly, it must be concluded that the drugs were passed by a non-permitted person in violation of the sequestration order. Thus, beyond the misconduct itself and the favor the jurors may have felt toward the government for excusing their obvious criminality there was a grave danger of other improper influence which the sequestration order was intended to guard against. Had the trial court properly appraised this factor, it might not have so lightly dismissed the juror misconduct claim at the new trial motion. In any event, violation of the sequestration order, which resulted in an authorized visit, subjected petitioner to the rendering of a verdict which was the product of influences other than the evidence presented in Court. The unauthorized visitor might well have discussed the case and prejudiced the juror. See Turner v. Louisiana, supra. Accordingly, petitioner's Sixth Amendment right to a fair trial and to an impartial jury was placed in severe jeopardy and a remand is necessary to ascertain whether the

right was indeed violated.

Conclusion

For all the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Third Circuit. That judgment should be vacated and a new trial ordered.

Respectfully submitted,

By _____
STEVEN H. GIFIS

By _____
ALAN DEXTER BOWMAN

Attorneys for Petitioner

Dated: January 15, 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1933 and 79-2421

UNITED STATES OF AMERICA,

Appellee,

v.

BRIGUGLIO, GABRIEL,

Appellant.

Appeal from the United States District Court
for the District of New Jersey
(Criminal No. 79-00072-04)

Argued October 16, 1980

Before: HUNTER and WEIS, Circuit Judges,
and CAHN,*
District Judge

JUDGMENT ORDER

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*Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation

APPENDIX A

After considering the contentions raised by appellant, to wit, that:

1(a) his trial counsel's failure to inform appellant and the court that he (trial counsel) was being investigated by a federal grand jury during trial violated appellant's rights to intelligently select an advocate in his behalf and to due process;

1(b) his trial counsel, as a matter of law, was rendered ineffective due to a pending grand jury investigation;

2) there was insufficient evidence to underpin admission of co-conspirator statements against appellant and insufficient evidence to support the convictions even assuming the admissibility of the statements;

3) the trial court abused its discretion in denying appellant's motion for a severance or in the alternative a change of venue;

4) pursuant to Fed. R. App. P. 28(i) appellant should prevail because of the arguments raised in behalf of appellants in Nos. 79-1913, 79-2387 (Thomas Andretta), 79-1912, 79-2381 (Anthony Provenzano) and 79-1956 (Stephen Andretta) insofar as those arguments are applicable to him and not inconsistent with the arguments raised herein.

It is ADJUDGED and ORDERED that the judg-

APPENDIX A

ment of the district court be and is hereby affirmed, without prejudice to appellant to pursue contentions 1(a) and 1(b) in collateral proceedings under 28 U.S.C. §2255 (1976).

BY THE COURT,

s/J.H. III

JAMES HUNTER, III,
Circuit Judge

Attest:

s/M.E.F.

M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: November 17, 1980

APPENDIX B

CONSTITUTION

Amend. 5

AMENDMENT V-CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

CONSTITUTION

Amend. 6

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

No. 80-1248

APR 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

GABRIEL BRIGUGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
KATHLEEN A. FELTON
Attorney

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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel because his attorney allegedly failed to disclose that the attorney was under investigation by a federal grand jury during the course of petitioner's trial.

2. Whether the district court properly denied petitioner's motions for severance and change of venue.

3. Whether the district court abused its discretion in dealing with an incident of juror misconduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1248

GABRIEL BRIGUGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1980. The petition for a writ of certiorari was filed on January 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of participating in the affairs of an enterprise conducted through a pattern of racketeering activity,[1] in violation of

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[1]The acts of racketeering consisted of unlawful payments to labor union employees or officers, in violation of 29 U.S.C. 186. See 18 U.S.C. 1961(1)(C).

18 U.S.C. 1962(c), and of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d). He was sentenced to seven years' imprisonment and fined $10,000. The court of appeals affirmed by judgment order, but expressly without prejudice to petitioner's raising his claims regarding his attorney's performance in a motion filed under 28 U.S.C. 2255 (Pet. App. 1a-3a).[2]

The evidence at trial, the sufficiency of which petitioner does not challenge, established that petitioner was part of a group that conspired to obtain illegal payments from trucking companies, through their control of a Teamsters Union local, in return for supplying labor peace. The group was led by Anthony Provenzano and included petitioner, Thomas and Stephen Andretta, and others, as well as Ralph Picardo, who was the government's chief witness at trial. The details of the scheme are outlined in our brief in opposition to the certiorari petition filed by petitioner's co-defendants (No. 80-78)[3] as well as in the previous opinion of the court of appeals affirming the convictions of the co-defendants. 620 F. 2d 985, 989-991 (1980).

Briefly, co-conspirator Ralph Picardo, who operated a trucking firm, negotiated an agreement with Interocean Service, Inc., which operated as the "in-house" trucker for a steamship company. Under the agreement, Picardo would supply trucks and owner-operator drivers to Interocean, thus enabling Interocean to avoid unionization and union obligations. Picardo also promised to guarantee that no

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[2]Petitioner was tried along with three co-defendants—Anthony Provenzano, Stephen Andretta, and Thomas Andretta—who were also convicted on both counts. Their convictions were affirmed in an earlier opinion. 620 F. 2d 985 (1980). All three then filed a petition for a writ of certiorari, and this Court denied review, No. 80-78 (Oct. 14, 1980).

[3]We are providing petitioner with a copy of our response in No. 80-78.

efforts would be made to organize Interocean's drivers and that Interocean's operations would not be interrupted by labor disputes. In return, Picardo received monetary payments through a "ghosting" scheme in which Interocean paid Picardo's company for fictitious drivers. These payments were then divided among the co-conspirators, with a one-quarter share going to petitioner and his brothers.

ARGUMENT

1. Petitioner contends that his rights to due process and to the effective assistance of counsel were violated when he was not informed that, during the course of his trial, his attorney, Thomas DiBiasi, was the target of a federal grand jury investigation into possible bank fraud in the same district in which he was being tried.

a. In August 1979, subsequent to petitioner's conviction, his attorney was indicted. The attorney later pleaded guilty. On September 20, 1979, petitioner, through new counsel, filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 (J. Supp. App. 25).[4] In an accompanying affidavit (*id.* at 26-30), petitioner stated that in the middle of April or early May, 1979, he noticed a change in DiBiasi's behavior and that DiBiasi's concentration and memory were not as sharp as they previously had been. Petitioner also averred that he felt it necessary on a number of occasions during the trial to call to DiBiasi's attention objections petitioner thought should be raised. One such incident, petitioner asserted, was during the opening argument by counsel for co-defendant Provenzano, who referred to "Briguglio" in a manner that petitioner contended might lead the jury to believe the attorney was speaking of petitioner rather than his brother. At petitoner's request, DiBiasi objected to the manner of the reference.

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[4] "J. Supp. App." refers to the Joint Supplemental Appendix in the court of appeals.

In his affidavit, petitioner also referred to several questions in DiBiasi's cross-examination of Picardo, contending that DiBiasi should have demonstrated that the union of which petitioner was an official did not have jurisdiction over the area of work in which Picardo testified that petitioner could supply labor peace. In addition, petitioner averred that he had informed DiBiasi that he was willing to take the stand but that DiBiasi advised him not to do so. Petitioner stated that his probation officer told him that he and the trial judge were surprised that petitioner had not taken the stand, because he had no prior criminal record. Petitioner also stated that the probation officer indicated that if petitioner had testified, he might have explained away his fingerprints on two checks that appeared to corroborate Picardo's testimony. Finally, petitioner stated in the affidavit that he had requested, but DiBiasi had declined, to tape record the trial proceedings, even though the court had consented to the bringing of dictating equipment into the courthouse.

Petitioner's wife also submitted an affidavit (J. Supp. App. 32-33), in which she stated that during the second week of trial, she spoke with DiBiasi concerning a plea offer from the AUSA. According to petitioner's wife, DiBiasi said that he and his wife also had discussed the difficulties of plea bargaining because an indictment would soon be returned against him, although DiBiasi later said that he was joking. Petitioner's wife also averred that she did not feel that DiBiasi was conducting cross examination in the manner she thought that he should.

DiBiasi, too, submitted an affidavit in connection with petitioner's Rule 33 motion (J. Supp. App. 35-36). He stated that while the grand jury investigation into his activities was underway, petitioner's trial had already commenced. He continued:

> I felt that I had not been in a position to withdraw from the trial and used all of my conscious efforts to properly defend my client. I feel, however, due to the nature of this investigation which eventually lead [sic] to my own indictment, that subconsciously, I was not in a position to give my client a total and proper defense and as a result of this, he may have been denied his right to competent counsel.

The district court denied petitioner's Rule 33 motion without a hearing. The court stated (J. Supp. App. 121) that "under no circumstances" would petitoner have been allowed to tape the trial and that the lawyers had been permitted to bring portable dictating equipment into the courthouse for an entirely different purpose. Moreover, in the court's view, the objection to DiBiasi's judgment that petitioner should not take the stand was "a typical afterthought of the defendant who exercises his best judgment at trial not to testify and has second thoughts" (*ibid.*). The court also rejected petitioner's assertion of error respecting the manner of DiBiasi's cross examination of Picardo (*id.* at 121-122). Finally, it found "absolutely no merit" to petitioner's contention that the jury may have confused petitioner with his brother, concluding that "[t]he jury well understood which Briguglio was being talked about at all stages of the proceeding[s]" (*id.* at 122). In sum, with respect to petitioner's motion generally, the court stated (*ibid.*):

> This motion about Mr. DiBiasi's incompetency has absolutely no merit. I sat here for three weeks, Mr. DiBiasi made effective representation. He was aggressive, he showed no indications during the course of the trial that he was in any way effected [sic] in his representation by his then pending legal difficulties which resulted in an indictment later this year.

The court of appeals affirmed by judgment order, but it made clear that its order was without prejudice to petition-

er's raising his arguments about DiBiasi's performance in a motion under 28 U.S.C. 2255.

b. Petitioner argues (Pet. 22-28) that review by this Court is necessary to determine the extent to which the conflict-of-interest principles developed in cases involving a lawyer's simultaneous representation of defendants having potentially competing interests apply to cases such as this one, where the alleged conflict of interest stems from wholly personal considerations affecting the lawyer. In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that in order to establish a Sixth Amendment violation, a defendant who raised no objections at trial must demonstrate that an actual conflict of interest, not the mere possibility of one, had adversely affected his lawyer's performance. *Id.* at 348-350. Petitioner asserts that because of the type of conflict alleged in this case, involving the internal psychological and emotional state of his lawyer rather than the easily perceived legal interests of different clients, it would be almost impossible to show any direct adverse effects on the quality of his legal assistance. Accordingly, he argues, the requirement of *Cuyler* that the defendant must show an adverse effect on the adequacy of the lawyer's performance should not apply to this type of conflict. Therefore, he contends that the mere non-disclosure of a personal conflict should be considered ineffective assistance of counsel as a matter of law (Pet. 41-48).

Whatever may be the merit of petitoner's legal argument—and we do not believe it is substantial on the present record—the case is not ripe for consideration by this Court. The district court did not hold an evidentiary hearing on petitioner's factual allegations. Therefore, as a threshold matter, there has been no finding that petitioner was, in fact, unaware of his lawyer's legal difficulties. And even now petitioner does not assert that he would have switched to another attorney if he had known of the grand jury's investigation of DiBiasi.

But beyond this, the record contains only the vaguest allegations of an adverse effect on DiBiasi's performance. By petitioner's own admission, DiBiasi objected to co-counsel's statements in opening argument that petitioner believed would lead the jury to confuse him with his brother. It therefore does not appear that any confusion actually resulted, even assuming that it would have in the absence of DiBiasi's objection. Further, DiBiasi's failure to tape record the trial hardly can be thought to reflect incompetence, especially in view of the court's observation that this would have been prohibited in any event. With respect to petitoner's failure to take the stand, petitioner offered only his *probation officer's* speculation that petitioner might have explained away fingerprints on two checks. Petitioner himself did not aver in his affidavit that he could or would have presented an explanation or what such an explanation might have been. Nor did he contend that he had even discussed the fingerprints or a possible exculpatory explanation for them with DiBiasi, much less what DiBiasi's reason may have been for declining to have petitioner testify if the fingerprints were discussed. Finally, petitioner's affidavit advanced only the barest speculation as to what the jury's impression might have been following the ten lines of cross examination with which petitioner took issue.

As can be seen, petitioner's averments, even if accepted as true, do not portray an incompetent attorney obsessed with his own legal difficulties. Indeed, DiBiasi himself stated in his affidavit that he used all "conscious efforts to properly defend my client" (J. Supp. App. 35); he concluded only that "subconsciously" he was not in a position to give petitioner a proper defense and, as a result, that petitioner *may* have been denied his right to competent counsel. DiBiasi furnished no particulars.

For these reasons, the present record would be a wholly inadequate one on which to consider petitioner's Sixth

Amendment claim of ineffectiveness and his due process claim of a violation of his right to intelligent selection of counsel. The court of appeals apparently agreed, for it denied relief, while expressly contemplating that petitioner might file a motion under 28 U.S.C 2255, on which the district court could hold an evidentiary hearing to explore petitioner's contentions. Given this, the case is, for all practical purposes, in the same posture it would have been in if the court of appeals simply had remanded for an evidentiary hearing on whether petitioner was aware that DiBiasi was under investigation and what the effects of that asserted conflict on DiBiasi's performance were. In that situation, the petition for certiorari plainly would be interlocutory and should be denied for that reason. The same result should follow here.[5]

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[5]In any event, the per se rule petitioner proposes—that an undisclosed personal conflict of interest should always be deemed to have resulted in ineffective assistance of counsel, irrespective of whether it adversely affected the lawyer's performance—would appear to be unsound, especially in this case. The Sixth Amendment guarantees an accused the "effective" or "adequate" assistance of counsel. *Cuyler* v. *Sullivan, supra*, 446 U.S. at 343-345, 349; *Holloway* v. *Arkansas*, 435 U.S. 475, 481, 483 (1978); *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). If a lawyer makes tactical decisions at trial that he would have made even in the absence of the asserted conflict of interest—and if those tactical decisions are within a range of competence that is otherwise acceptable under the Sixth Amendment—then it would seem that the defendant has not been deprived of the "effective" or "adequate" assistance of counsel despite the asserted conflict of interest. The rule announced in *Cuyler*—that a defendant attacking his conviction on conflict-of-interest grounds must show that his attorney's performance was "adversely affected" by an actual conflict of interest—serves to ensure that an otherwise valid conviction will not be set aside except upon a showing that the lawyer's performance was, in fact, ineffective. It is not clear why a different rule should obtain simply because, as here, the alleged conflict of interest stems from personal factors affecting the lawyer, not from the lawyer's representation of several clients having competing interests.

Moreover, in the district court, petitioner did not portray DiBiasi's position as presenting a conflict of interest—*e.g.*, on the ground that DiBiasi may have been torn between a duty to represent petitioner and a

2. Petitioner also contends (Pet. 51-58) that because of the notoriety of Anthony Provenzano, his co-defendant, he could not be jointly tried with Provenzano without prejudice and that the district court erred in denying his motions for severance and change of venue. However, the Court declined to grant review on this same claim with regard to petitioners' co-defendants Thomas and Stephen Andretta (cert. denied, No. 80-78 (Oct. 14, 1980)).[6] Petitioner offers no additional reason why review should be granted as to him.

3. Finally, petitioner claims error (Pet. 59-61) in the trial court's handling of an incident of juror misconduct. The jury in this case was sequestered. Toward the end of the trial, a marshal discovered that a juror and two alternate jurors were smoking a marijuana cigarette. The incident was reported to the district judge, who related it to counsel and sought their opinions on an appropriate course of action. Defense counsel agreed that the jurors should not be removed and suggested in addition that the court inform the jurors that they would not be prosecuted. The court followed defense counsel's recommendation. See J. Supp.

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desire to curry favor with the U.S. Attorney's Office. Compare *United States* v. *DeFalco*, Nos. 78-2126 & 2209 (3d Cir. Dec. 28, 1979) (en banc), upon which petitioner relies (Pet. *passim*). Rather, petitioner's contention was that DiBiasi was distracted by the grand jury investigation and therefore did not devote his full attention to the trial. These allegations partake more of an ordinary claim of ineffectiveness of counsel than of a conflict of interest. As a consequence, it would seem to be especially appropriate to require petitioner to demonstrate that DiBiasi's performance was in fact rendered ineffective. A claim that an attorney's performance was adversely affected by the lawyer's concern about his own legal difficulties is, in practical effect, no different from a claim that the attorney was distracted by other personal considerations, such as a busy law practice, family problems, or ill health. Certainly in these situations, some showing that the lawyer actually rendered ineffective assistance would be necessary.

[6]We addressed these contentions in our Brief in Opposition in No. 80-78, at 8-9.

App. 9, 11, 16-17, 38-42, 117-118. The question whether the district court properly dealt with the incident was thoroughly discussed by the court of appeals in its review of the conviction of petitioner's co-defendants (620 F. 2d at 996-997), and this Court declined to grant further review (No. 80-78, *supra*).[7]

Petitioner now argues that there was no evidence that the person who supplied the marijuana cigarette to the juror was a person who was authorized to visit under the court's sequestration order. Based on speculation that the supplier was not an authorized visitor, petitioner further suggests (Pet. 16, 21) that, because an unauthorized visitor would not have been informed that he should not discuss the case with the juror, the supplier of the marijuana cigarette "might" have engaged in such conduct. Thus, he argues, a remand is necessary to consider the circumstances of the incident.

However, all assertedly prejudicial aspects of this incident were thoroughly examined in the initial discussion of the matter as well as on argument of the new trial motion. As the district court observed, all defense counsel agreed to the procedure to be followed, and no one asked for an inquiry of the juror involved (J. Supp. App. 111). Petitioner's belated speculation, without any supporting evidence, that the incident *might* have involved a violation of the sequestration order and, further, that the supplier *might* have discussed the trial with the juror, does not warrant review.

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[7]The marijuana incident was discussed in our Brief in Opposition in No. 80-78, at 9-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

APRIL 1981

DOJ-1981-04